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Office of Administrative Law Judges
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Issue Date: 08 June 2004

CASE NO.: 2003-LHC-2825

OWCP NO.: 07-160952

IN THE MATTER OF

GILDA Y. ALEXIS,
Claimant

v.

UNIVERSAL MARITIME SERVICES, LTD.,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSN. LTD.,
Carrier

APPEARANCES:

LEONARD A. WASHOFSKY, ESQ.
On behalf of the Claimant

MAURICE E. BOSTICK, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Gilda Y. Alexis (Claimant) against Universal Maritime Services, Limited (Employer) and Signal Mutual Indemnity Association Limited (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Metairie, Louisiana, on April 5, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit 1; and
2. Employer's Exhibits 1-9 and 11-24.

After the record was closed, Claimant submitted an April 14, 2004 medical report for admission into evidence. Because the medical evidence already admitted in this case is quite comprehensive, and because the medical report merely reiterates a doctor's opinion which is already contained in the record, I find that the April 14, 2001 report shall not be admitted into evidence and will not be considered in my decision and order.

Based upon the stipulations of the parties at the hearing, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

1. Jurisdiction is not a contested issue. Claimant was a clerk/checker for a shipping terminal located on navigable waters of the United States.

2. Date of workplace injury: January 29, 2001.

3. Injury in course and scope of employment: Yes.

4. Employer/employee relationship at time of accident: Yes.

5. Date Employer advised of injury: January 29, 2001.

6. Date Notice of Controversion filed: September 19, 2001, November 1, 2001, and February 17, 2003.

7. Date of informal conference: April 7, 2002, and April 9, 2003.

8. Average weekly wage at time of injury: $988.06.

9. Nature and extent of disability:
    a. Temporary total disability: February 12, 2001, to September 4, 2001; September 27, 2001, to October 24, 2001; July 29, 2002, to February 10, 2003.

b. Benefits paid? Yes, from September 12, 2001, to February 10, 2003 (although not continuously); 61 3/7 weeks at $658.71 per week. Total paid: $40,463.61.
c. Medical benefits paid? Yes.

II. ISSUES

The unresolved issues in this proceeding are:

1. Whether Claimant can return to work at Universal Maritime Services as a gatehouse clerk at pre-accident wages.

2. Other suitable alternative employment.

3. Date of maximum medical improvement.

4. Whether Claimant is entitled to further medical benefits.

5. Whether Claimant is temporarily totally disabled, permanently partially disabled, permanently totally disabled, or not disabled at all.

6. Whether Claimant is entitled to any further TTD, PPD or PTD benefits.

7. Whether Claimant is entitled to attorney's fees.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a fifty-three year old high school graduate who resides in New Orleans. (Tr. 84-85). She currently receives Social Security disability benefits. (Tr. 84). Claimant attended college for about two years. She eventually began working on the waterfront as a clerk. (Tr. 85). In 1995, Claimant became a roster clerk for the same continuous operation at the Sealand Terminal. (Tr. 87-88). She was assigned to different jobs, typically in the warehouse and the yard. (Tr. 88). In 2000, Claimant began working more frequently in the gatehouse. (Tr. 97). She testified that none of the clerks would take over each other's computers if someone left to take a break. (Tr. 97-98). She also explained that the truckers got upset if they were kept waiting, so it was difficult for the clerks to take breaks. (Tr. 98-100). Until the time of her workplace injury, Claimant had no neck or back problems and no sort of physical disability or disease. (Tr. 90-91).

After Claimant's accident, she was sent to a doctor who took some x-rays, prescribed medication and sent her back to work on light duty. (Tr. 91). Claimant

worked for about three or four days after that, until her pain prevented her from coming back. Claimant then began treating with Dr. Vaclav Hamsa. (Tr. 92). In August 2001, Dr. Hamsa suggested that Claimant return to sedentary or light duty work, and she agreed to try, although she told Dr. Hamsa she was not sure that she could do it. (Tr. 94). Claimant attempted to do the job but was unable to work more than two hours, so she returned to Dr. Hamsa for further treatment. (Tr. 101-02).

Claimant testified that she did not complain about her low back pain to Dr. Robert Steiner because her back started hurting after she saw him for the last time in January 2003. (Tr. 94-95, 103, 145-46). Claimant did not recall at what point she began complaining of low back pain. (Tr. 143-44). She did not discuss the gatehouse job with Dr. Steiner when she saw him in October 2001. (Tr. 102). Claimant testified that when she returned to Dr. Steiner in May 2002 and told him about her upcoming surgery, he told her that surgery would not help her condition. (Tr. 103-04).

In June 2003, Claimant underwent a functional capacity evaluation (FCE). (Tr. 106). She testified that she gave her best effort during the testing but had to stop because of the pain. (Tr. 109-10, 129). Claimant did not recall refusing to perform three tests in which she was asked to lift a five-pound weight with her hand. (Tr. 129).

Claimant's condition has not improved since her July 2002 surgery. (Tr. 104). She has experienced no relief from her neck and back pain, and now her legs and right side also bother her. (Tr. 104-05). Claimant cannot sit for more than ten or fifteen minutes at a time without her neck hurting down to the middle of her back, and she cannot walk for long distances without her right leg hurting. (Tr. 126). Claimant can only drive for about twenty or thirty minutes at a time. Her husband usually accompanies her when she goes grocery shopping. (Tr. 127). Claimant sometimes goes to the mall to walk around for about thirty minutes at a time. (Tr. 146).

In a typical day, Claimant spends about fifteen or twenty minutes driving her daughter to school in the morning before returning home and resting. Sometimes Claimant runs errands or visits her father. (Tr. 111). When Claimant gets into her car, she usually sits down first and then swivels around, although sometimes she does go in "front first." (Tr. 113). She is unable to turn her head to watch for traffic. (Tr. 117). Claimant testified that sometimes her leg gets numb when she drives. (Tr. 153). Claimant explained that her doctor advised her to get out and do things in order to combat her depression, so she has been trying to get out more often. (Tr. 119-20, 154).

Claimant affirmed that she went shopping at Wal-mart on March 12, 2004. (Tr. 119). The ride took about thirty-four minutes. (Tr. 152). She testified that none of her grocery bags weighed over ten pounds. (Tr. 121). She also lifted a bag of ice which weighed seven pounds. (Tr. 138). Claimant affirmed that on that day, she drove around and did some shopping over the course of two hours and fifteen minutes. (Tr. 139). She

testified that although she appeared to be walking with no problem on that day, her legs were bothering her nonetheless. (Tr. 139-40).

Since her surgery, Claimant has never attempted to do the gatehouse clerk job, although she acknowledged that her attorney might have told her that the gatehouse job was available to her beginning in February 2003. (Tr. 132, 147). She affirmed that this job involves no lifting but stated that "there's no way" that she can do this job because she cannot stand up and lean over to work on the computer. (Tr. 95-96, 155, 157). Even with accommodations for raising and lowering the desk, Claimant did not think she would be able to work at the gatehouse because of her pain. (Tr. 123). Claimant testified that she never considered any of the job opportunities cited in the labor market survey. (Tr. 157-58). Claimant stated that she cannot do any job at this point. (Tr. 124). She testified that she would return to work if she was able to do so. (Tr. 122-23). Dr. Hamsa recently suggested that Claimant undergo another MRI, but this study has not been performed. (Tr. 105-06).

Testimony of Max Sanders, Jr.

Mr. Sanders is a terminal manager for Employer. He testified that Claimant, who was a roster clerk for Employer, was a very good worker. (Tr. 22). At the time that Claimant was injured in January 2001, she was one of about eight or nine roster clerks who worked on a daily basis. (Tr. 25). Typically, the clerks were assigned to the ship operation, the office, the gatehouse or the warehouse. (Tr. 26-27). Management assigned the clerks to these various locations at will.

According to Mr. Sanders, there are one or two clerks who are assigned solely to the gatehouse. If Claimant returned to work, she would be assigned to that position as well. (Tr. 28). The gatehouse clerk position involves entering information into the computer while receiving and dispatching containers and answering the phone when dealing with truck drivers awaiting assistance. (Tr. 31). The job can be performed while sitting or standing, but most clerks prefer to sit. (Tr. 32). The clerks sit in adjustable swivel chairs and work at computer monitors which are also adjustable. (Tr. 40). On a typical day, about 275 to 400 containers are processed at the gatehouse. (Tr. 34). The clerks are able to get up and take breaks, and they also have a lunch break. (Tr. 35). Claimant was fully trained to do that job, and Employer was willing to place her in that job within her restrictions. (Tr. 29).

Claimant returned to work for about two hours in 2001 but never told Mr. Sanders that she needed accommodations in order to do the gatehouse clerk job. (Tr. 40-41). Mr. Sanders testified that Employer could have obtained a raised desk for Claimant so that she would not have to bend down to use the computer. (Tr. 32-33). In February 2003, Employer offered the permanent gatehouse clerk job to Claimant at her pre-accident wage. (Tr. 42). Employer was willing to accommodate Claimant's restrictions after her

surgery, but she never attempted to return to work. (Tr. 32-33). At the time of the hearing, the gatehouse clerk job continued to be available to Claimant. (Tr. 43).

Testimony of Stephen J. Smith

Mr. Smith is an insurance adjuster who administers claims for Carrier. (Tr. 44). He has been handling Claimant's claim since her workplace accident. (Tr. 48). He initiated payment on February 12, 2001, the day that he received a not-fit-for-duty slip from Claimant's doctor. (Tr. 49). Mr. Smith terminated compensation on September 4, 2001, the day that Dr. Hamsa, Claimant's treating physician, released her to return to work as a gatehouse clerk. (Tr. 51). Mr. Smith did not recall having a conversation with Dr. Hamsa about the requirements of the job but "guess[ed]" that Dr. Hamsa probably did not have a copy of the job description when he released Claimant to return to work. (Tr. 53-54). Mr. Smith affirmed that at that time, there was no arrangement made to accommodate Claimant's need to sit and stand while working at the gatehouse position. (Tr. 81-82). Claimant never told Mr. Smith that she needed special accommodations. (Tr. 83).

In Mr. Smith's opinion, Dr. Hamsa's September 26, 2001 report indicated that Dr. Hamsa felt that Claimant was able to return to work, although at Claimant's insistence, he asked that Employer let her not return to work. Mr. Smith ultimately began paying Claimant compensation again on September 27, 2001, until October 24, 2001, when Dr. Steiner opined that Claimant was able to return to work as a gatehouse clerk. (Tr. 57, 49). Mr. Smith has never paid Claimant compensation for the period between September 5 and September 26, 2001. (Tr. 57). He never offered Claimant vocational rehabilitation after compensation was ceased. (Tr. 69).

Mr. Smith acknowledged that an April 2001 medical report from Dr. Steiner indicated that Claimant had some injury to her cervical spine at that time. (Tr. 62). Mr. Smith affirmed that he denied the discogram recommended by Dr. Hamsa. (Tr. 66). Mr. Smith did not start paying Claimant compensation again until she underwent surgery in July 2002, because Dr. Steiner had opined that she was able to return to work. (Tr. 67). When asked if he would approve an MRI recommended by Claimant's current treating physician, Mr. Smith explained that he would first send Claimant back to Employer's doctor to get a second opinion on whether the MRI was necessary. (Tr. 74).

Testimony of Larry Stokes, Ph.D

Dr. Stokes is a rehabilitation counselor. (Tr. 160). In September 2003, he was hired by Employer's counsel to conduct a vocational rehabilitation assessment of Claimant. (Tr. 161, 191). In his vocational testing of Claimant, he conducted an inventory of Claimant's aptitude based on work history and also gave her some intelligence, achievement and interest inventory tests. (Tr. 163-64). He also obtained

information on her age, education, work experience, ability to work and medical history. (Tr. 191-92). Dr. Stokes' report was not completed until some months later, primarily because of scheduling problems with an on-site job analysis. (Tr. 165).

Dr. Stokes testified that the gatehouse job required sitting six to eight hours per day at the computer, but alternative sitting and standing was allowed. (Tr. 188). He observed the gatehouse clerks standing, walking, making copies and sitting at computer terminals. The clerks were seated for more than ten to fifteen minutes at a time. (Tr. 189). He noted, however, that if someone needed to stand up more often, it would be possible to make accommodations. (Tr. 189-90). Dr. Stokes testified that the swivel chairs used by the gatehouse clerks had rollers and could be adjusted up and down. He affirmed his awareness of computer tables which can be adjusted and testified that in his opinion, such a table would be a reasonable accommodation for an employee with physical limitations. (Tr. 201).

When asked about the jobs that he identified for Claimant in a labor market survey, Dr. Stokes testified that an inventory control clerk position was light duty and involved lifting ten pounds frequently with a twenty pound maximum. Physical requirements included standing and walking up to six hours a day. This job was more physically demanding than the sedentary gatehouse job offered by Employer. (Tr. 174). The wages ranged from $6.46 to $10.59 per hour. (Tr. 174-75). The job with a towing company was a sedentary position which involved answering phones and dispatching tow trucks. Alternate sitting, standing and walking were allowed. (Tr. 175). The pay ranged from $9.03 to $15.69 per hour. (Tr. 193). Another dispatching job had a lifting requirement of five pounds and paid $25,000 to $30,000 per year with no educational requirements. (Tr. 175). All of these employers had openings at the time of the labor market survey. (Tr. 193-94).

A security central dispatcher position involved typing information into computers and taking emergency calls from alarms. It was a sedentary position which paid $7 to $7.50 per hour. There were no current job openings, but the employer was taking applications. (Tr. 194). A customer relations position with a security company involved sitting at monitors and guiding visitors to offices within the building. This job, which was available, required a high school education and paid $7.39 to $8.96 per hour. (Tr. 195). A guest services agent job at the Hilton involved checking people in and out of the hotel and closing out guest accounts. (Tr. 175-76). It was a sedentary job with on-the-job training and no educational requirements. (Tr. 176). This job paid $6.90 to $8.74 per hour, and the employer did have openings. (Tr. 195).

Dr. Stokes testified that Dr. Hamsa agreed that Claimant was able to perform all the jobs identified in the labor market survey. (Tr. 178, 195). Dr. Stokes further concluded that based on Dr. Steiner's opinion, the FCE and his own observations, Claimant was able to do the gatehouse clerk job. (Tr. 179-81, 198-99, 201). He noted

that neither Dr. Hamsa nor Dr. Stefan Pribil addressed this job, although Dr. Pribil opined that Claimant was temporarily totally disabled and could not work at all. Dr. Stokes did not give any more weight to Dr. Pribil's opinion when juxtaposed against Dr. Steiner's opinion, Dr. Hamsa's opinion and the FCE results. (Tr. 181). Dr. Stokes pointed out that the jobs that he identified for Claimant, as well as the gatehouse clerk job, did not involve any of the restrictions mentioned by Dr. Pribil in his reports. (Tr. 182-83). He believed that Claimant would have been able to obtain any of jobs from the labor market survey if she had attempted to do so. (Tr. 195-96).

Testimony of Ed Cummings

Mr. Cummings is a private investigator who surveilled Claimant on April 10, 2003. (Tr. 207). On this day, Claimant drove from her home to a local mall at 8:39 a.m. (Tr. 207, 215). Mr. Cummings videotaped Claimant walking into the mall. (Tr. 207). He then walked into the mall and followed Claimant for one circuit before returning to his vehicle and waiting for her to leave. Mr. Cummings estimated that he followed Claimant for about fifteen minutes, and he waited for her in his car for about thirty minutes after that. (Tr. 208). He did not know whether Claimant walked for the entire thirty minutes after he left but noted that most stores in the mall were closed, as it was 8:30 or 9:30 in the morning. (Tr. 209).

At 9:27 a.m., Claimant walked out of the mall and to her car. She sat there for approximately two minutes before driving to a seafood store, where she arrived at 9:37 a.m. (Tr. 213). After Claimant departed the store at 10:15 a.m., Mr. Cummings then followed Claimant back to her home, where she arrived at 10:25 a.m. (Tr. 214).

Testimony of William Naquin

Mr. Naquin is a licensed physical therapist who conducted an FCE of Claimant on June 9 and 11, 2003. (Tr. 216-17, 239). Mr. Naquin testified that normally clients are testified for about three to four hours each day during an FCE. He affirmed that it was possible that Claimant was only at his office for about two hours on June 9. (Tr. 239).

During an FCE, Mr. Naquin asks the client to give maximum effort in order to determine the client's best ability to do activities post-injury. (Tr. 220). There are several means of objectively determining whether someone is using maximum effort, including heart rate, muscles used and body mechanics. (Tr. 220-22). While it is the patient's prerogative to stop testing at any time because of pain, the heart rate and body mechanics can indicate sub-maximum effort. (Tr. 222). Mr. Naquin also explained that if a client reports an abnormal symptom during testing, a physical therapist will use Waddell signs to determine whether symptom magnification is present. Three out of five positive Waddell signs indicate symptom magnification. (Tr. 223).

In Claimant's case, Mr. Naquin found that she did not exhibit maximum effort during all of the testing. (Tr. 222-23). In addition, Claimant refused to do three tests in which she was asked to lift five-pound objects. (Tr. 231). Claimant had three positive Waddell signs, such that Mr. Naquin concluded that she exhibited symptom magnification. (Tr. 224). He determined that Claimant was able to return to at least sedentary level work but noted that he was unable to provide a more definite assessment due to her "extreme self-limiting behavior" during testing. (Tr. 227-28, 229-30). Mr. Naquin found that, at a minimum, Claimant could perform continuous bilateral upper extremity coordination tasks and frequent elevated work. (Tr. 227). Claimant should be limited to occasional forward bending and sitting, crouching, kneeling, sitting tolerance, standing tolerance, rotational sitting and standing. Claimant would be limited to rare forward bending in standing, ladder and stair climbing, walking and repetitive squatting. (Tr. 244). Mr. Naquin assigned Claimant an occasional sitting capacity of six to thirty-three percent minimum in an eight-hour day but affirmed that he could not determine the maximum amount of time that Claimant could sit. (Tr. 253, 256-57).

Mr. Naquin cited poor grip strength, positive Waddell signs, no increase in heart rate during complaints of pain and refusal to perform many lifting tasks as examples of Claimant's self-limiting behavior. (Tr. 228-29). In addition, Mr. Naquin concluded that Claimant had inappropriate pain behavior because she rated her pain as a 10 of 10, meaning pain so great that a person must go to the hospital, yet finished portions of the testing on that day. (Tr. 234-35). Mr. Naquin testified that some clients may show symptom magnification signs while still giving a good effort on the tests, and some people may have no Waddell signs but show lack of voluntary effort. In Claimant's case, however, the positive Waddell signs correlated to the objective indications of sub-maximum effort. (Tr. 246).

Medical Evidence

Deposition and Medical Records of Rudolf Vaclav Hamsa, M.D.

Dr. Hamsa is an orthopedic surgeon who first began treating Claimant in February 2001, shortly after her workplace accident. (EX. 16, p. 31; EX. 17, pp. 3-4). He first documented Claimant's complaints of low back pain during her initial appointment with him. (EX. 16, pp. 31-32). Dr. Hamsa's initial diagnoses included discogenic cervical sprain, tension-headache syndrome and discogenic lumbar-sacral sprain. (EX. 16, p. 32).

In August 2001, Dr. Hamsa recommended to Carrier's representative that Claimant should be limited to lifting no more than thirty pounds and carrying no more than twelve pounds and should avoid prolonged bending and stooping. (EX. 17, pp. 5-6). He did not think that standing, walking and sitting were problems. (EX. 17, p. 6). On August 31, 2001, Dr. Hamsa signed off on the gatehouse clerk position as a suitable job for Claimant. (EX. 17, p. 8).

On September 4, 2001, Claimant and her husband called Dr. Hamsa and told him that she was totally disabled and could not do the job. Dr. Hamsa explained to Claimant that she would be able to attend physical therapy while working at this job and would be allowed to sit and stand and take breaks as needed at work. (EX. 17, p. 12). When Claimant saw Dr. Hamsa the next day, he attempted to reassure her about the situation, but she was so reluctant to attempt a return to work that he ultimately decided to ask Employer to delay the return to work until Claimant had completed a course of physical therapy. (EX. 17, pp. 12-13, 15-16). Claimant was very animated and exhibited movement in her neck. (EX. 17, p. 16). On September 27, Claimant told Dr. Hamsa that she had returned to work but was unable to do the job. (EX. 17, p. 14). After running some more tests, Dr. Hamsa determined that Claimant had a disc problem and an instability problem in her cervical spine, so he took her off work and referred her to a spine surgeon. (EX. 17, pp. 18-19).

Dr. Hamsa saw Claimant on January 21, 2003, several months after her three-level cervical fusion surgery. (EX. 16, p. 74; EX. 17, pp. 21-22). Claimant, who told Dr. Hamsa that she was doing "terribly," described a stinging sensation from the upper to lower back. (EX. 17, pp. 22-23). Dr. Hamsa suspected spondylosis or symptomatic arthritis spinal syndrome. Claimant had nearly functional range of motion of the cervical spine and also exhibited spontaneous motion of neck while talking to Dr. Hamsa. She had no spasm in the cervical spine. (EX. 17, p. 23). She was neurologically intact, and her x-rays showed a good fusion. (EX. 17, p. 24).

Dr. Hamsa did not comment upon the results of Claimant's July 2003 FCE, but he did note that given Claimant's cervical fusion, she might have a problem with repeatedly looking up and down while working. (EX. 17, pp. 33, 37). He testified that patients who undergo cervical fusions usually reach MMI a year after surgery. He believed that Claimant had reached MMI. Restrictions for cervical fusion patients typically include restrictions from overhead work or working at horizontal level, as well as weight lifting restrictions. (EX. 17, p. 36). Usually, this type of surgery does not render a patient permanently and totally disabled. (EX. 17, pp. 39-40). Dr. Hamsa did not know whether Claimant was able to work at a computer for six to eight hours per day. (EX. 17, p. 42). He deferred to Dr. Pribil's opinion on whether Claimant was able to perform the gatehouse clerk job. (EX. 17, p. 45).

On March 11, 2004, Claimant returned to see Dr. Hamsa. At that time, Claimant complained of right leg problems and low back pain. Dr. Hamsa noted that Claimant's complaints of low back pain had been present since her January 2001 workplace accident. Dr. Hamsa noted that Claimant had a bulge in the L4-5 disc and speculated that Claimant was suffering from an L-5 nerve root syndrome. Claimant's cervical spine, on the other hand, was improved, with more spontaneous range of motion. Dr. Hamsa requested approval for a lumbar MRI study. (EX. 16, p. 81).

Deposition of Robert Steiner, M.D.

Dr. Steiner is an orthopedic surgeon who first examined Claimant on April 20, 2001. (EX. 14, pp. 7-8). At that time, he took a history, conducted a physical examination, reviewed a cervical MRI and reviewed Dr. Hamsa's records. (EX. 14, p. 8). Dr. Steiner thereafter diagnosed Claimant with a herniated cervical disc at C4-5. (EX. 14, pp. 8-9). He testified that her complaints and findings were suggestive of cervical radiculopathy and that there was some aggravation of a pre-existing degenerative change in her neck. He found that her current symptoms were work-related and that she was not at MMI. He suggested that Claimant would benefit from physical therapy and that she was able to do sedentary work. (EX. 14, p. 9).

Dr. Steiner next evaluated Claimant on October 24, 2001. (EX. 14, p. 10). He found that Claimant had degenerative cervical disc disease and cervical disc protrusion or herniation at C4-5. He did not think that a discography study was necessary but did suggest a myelogram and CT scan. Based on the gatehouse clerk job description, Dr. Steiner found no reason that Claimant could not do that job. (EX. 14, p. 14). He explained that the herniated disc in Claimant's neck would not affect her ability to sit during an eight-hour work day. (EX. 14, p. 28).

On May 17, 2002, Dr. Steiner completed a report in which he reviewed Claimant's medical records and her cervical CT scan and myelogram reports. (EX. 14, p. 15). He recommended a single level fusion at C4-5 if Claimant was unable to live with her current symptoms. (EX. 14, p. 16). He recognized the degenerative changes at C5-6 and C6-7 but did not believe that surgery on those levels was necessary to achieve a satisfactory result. (EX. 14, p. 30).

On January 27, 2003, Dr. Steiner examined Claimant again. (EX. 14, p. 15). Claimant, who had undergone surgery in July 2002, complained of neck pain, occasional right shoulder and hip pain and occasional tingling in her left hand. (EX. 14, pp. 16-17). Claimant's tenderness to palpation was disproportionate to the amount of pressure Dr. Steiner applied in the posterior cervical region, which was a sign of symptom magnification. (EX. 14, pp. 17-19). Claimant had no neck spasms. (EX. 14, p. 17). There was no tenderness in the thoracic or lumbar spinal regions. (EX. 14, pp. 17-18). Claimant also exhibited two other positive Waddell signs. (EX. 14, pp. 19-20).

Dr. Steiner took x-rays of Claimant's neck and studied a post-operative cervical spine CT scan and MRIs of the lumbar spine and thoracic spine. In his opinion, these studies indicated degenerative changes normal for someone of Claimant's age. (EX. 14, pp. 21-22). Dr. Steiner diagnosed Claimant with cervical spondylosis. He found no clinical evidence of cervical radiculopathy and felt that Claimant was at MMI and was able to return to work in a light duty position such as the gatehouse clerk job. (EX. 14, p.

22). He suggested that Claimant be restricted from lifting over ten pounds. (EX. 14, p. 35).

When asked about the findings of symptom magnification and sub-maximum effort during Claimant's FCE, Dr. Steiner affirmed that these findings were consistent with his own findings upon physical examination. (EX. 14, p. 23). When asked if there might be some non-organic problem that prevented Claimant from returning to work, Dr. Steiner noted her lack of motivation to return to work. (EX. 14, p. 34).

Deposition of Stefan G. Pribil, M.D.

Dr. Pribil is a neurological surgeon who began treating Claimant in January 2002 on a referral from Dr. Hamsa. (EX. 12, pp. 6-7). Claimant first presented to Dr. Pribil with complaints of neck and left arm pain. (EX. 12, p. 7). Dr. Pribil explained that while Claimant might later have had complaints of back and leg pain, his treatment of Claimant focused primarily on her cervical spine problems. (EX. 12, p. 8). Dr. Pribil first documented Claimant's complaints of low back pain on May 14, 2002. (EX. 12, p. 9).

Dr. Pribil diagnosed Claimant with cervical disc disease at C4-5, C5-6 and C6-7 and performed a fusion at those levels on July 29, 2002. (EX. 12, pp. 9-10). The purpose of the surgery was to stabilize Claimant's cervical spine and relieve her pain. (EX. 12, p. 11).

In May 2003, Dr. Pribil recommended an FCE for Claimant in order to determine her capacity to return to work. (EX. 12, pp. 11-12). After the FCE, Dr. Pribil disagreed with Mr. Naquin's determination that Claimant was capable of returning to her previous employment because he did not believe that Claimant was able to sit for more than one or two hours a day to work on a computer or walk or stand more than one or two hours a day. (EX. 12, pp. 12-13, 16-17). In his opinion, Claimant was not capable of returning to her previous job at that time. She was to continue following up with Dr. Pribil, who anticipated an MMI date in the next few months.

When asked about Mr. Naquin's determination that Claimant engaged in symptom magnification during the FCE, Dr. Pribil testified that Claimant had a very low tolerance for pain and might "be more sensitive to painful stimuli than perhaps other people." (EX. 12, p. 13).

Dr. Pribil testified that Claimant might be able to do a job in which she could frequently stand up, walk around and then sit down. In his opinion, an occupational physiatrist would be better able than a physical therapist to determine Claimant's ability to return to work. (EX. 12, p. 17). According to Dr. Pribil, Claimant continues to have the same problems with neck pain, although there is no objective medical evidence to explain why her condition has not improved since surgery. (EX. 12, pp. 19-20). There is

objective evidence that Claimant now has thoracic spine problems which are contributing to her discomfort. (EX. 12, pp. 20-21). Dr. Pribil testified that Claimant's requirement for medications has been low but consistent. (EX. 12, p. 25). Although he would continue to prescribe medication, he would also tell Claimant that living on pain medication is not ideal and that she should look at possibilities which would decrease her need for medication. (EX. 12, pp. 25-26). Specifically, he suggested the possibility of removing the hardware in Claimant's spine in order to alleviate her neck pain. (EX. 12, pp. 26-27).

At the time of his deposition, Dr. Pribil continued to believe that Claimant was incapable of returning to work, based upon her subjective complaints. (EX. 12, pp. 19, 22). In particular, he testified that it would be hard for Claimant to do one to two hours each of sitting, standing and walking in one day. (EX. 12, p. 29). If Claimant had no complaints, on the other hand, Dr. Pribil would find her capable of returning to work. (EX. 12, pp. 21-22). Dr. Pribil affirmed that Claimant has reached MMI. (EX. 12, p. 22). In terms of restrictions, he recommended that Claimant avoid climbing, working at elevated platforms without protection, climbing step ladders, crouching, stooping, twisting, bending, working overhead and lifting overhead and away from the body, because all of these activities would increase the stress placed upon Claimant's neck and back. (EX. 12, p. 23).

IV. DISCUSSION

Credibility

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993). Claimant in this case was a fairly credible witness. However, the evidence when taken as a whole indicates a disparity between her subjective complaints of pain and the objective

medical evidence in this case, such that I have placed less weight upon her subjective complaints of pain when viewed in light of the objective medical evidence.

Nature and Extent

Having established work-related injuries, the burden rests with the claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbldg. Constr. Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbldg. & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

Drs. Hamsa, Steiner and Pribil all agree that Claimant has reached MMI. Dr. Hamsa, one of Claimant's treating physicians, testified that she had reached MMI with regard to her cervical fusion when he examined her on January 21, 2003. Dr. Steiner examined Claimant several days later and also placed her at MMI. Accordingly, I find that Claimant reached MMI on January 21, 2003.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date

on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

It is undisputed that Claimant has been unable to return to her former employment as a roster clerk since her January 2001 workplace accident. Claimant has thus established a prima facie case for total disability.

Suitable Alternative Employment

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); Turner, 661 F.2d at 1043; 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbldg. & Dry Dock Co., 12 BRBS 691 (1980); Pilkington v. Sun Shipbldg. & Dry Dock Co., 9 BRBS 473; 477-80 (1978). See also Armand v. American Marine Corp., 21 BRBS 305 (1988)

(job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbldg. & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Indust. v. Director, OWCP, 137 F.3rd 326 (5th Cir. 1998).

A job within an employer's facility continues to meet the employer's burden of proof where it is suitable and available even if the claimant fails to report to work. Walters v. Ingalls Shipbldg., Inc., 31 BRBS 75 (CRT) (5th Cir. 1997). Once an employer establishes suitable alternative employment by providing light duty work which a claimant successfully performs but is subsequently discharged for breeching company rules and not for reasons related to his disability, the employer does not bear any new burden of providing other suitable alternative employment. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993); see also Harrod v. Newport News Shipbldg. & Dry Dock Co., 12 BRBS 10, 14-16 (1980) (employer met burden by showing alternative job, even though the claimant was later fired for bringing a gun to work). Once a claimant is terminated for reasons unrelated to the work related disability, the employer no longer has a duty to show suitable alternative employment and has no duty to pay further compensation benefits. Darby v. Ingalls Shipbldg., Inc., 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996).

In this case, there are two separate time periods at issue with respect to the question of suitable alternative employment—first, whether the gatehouse clerk job was suitable alternative employment for Claimant pre-surgery and then, whether this job was suitable for Claimant when she reached MMI after her surgery.

Pre-Surgery Time Period

On August 31, 2001, Dr. Hamsa signed off on the gatehouse clerk position as being suitable alternative employment for Claimant. On September 4, Carrier stopped payment of Claimant's compensation. Claimant attempted to return to work but was unable to complete a full work day. On September 27, 2001, Claimant returned to see Dr. Hamsa, who found a disc problem and some instability in Claimant's cervical spine and requested that Employer let her remain off work. Carrier began paying compensation again until October 24, when Dr. Steiner opined that Claimant was able to return to work as a gatehouse clerk. Claimant remained off work without compensation for several months before ultimately undergoing a three-level disc fusion in July 2002. Because

Claimant's treating physician took her off work and never found that she was able to return to work before her surgery, I find that the gatehouse clerk job did not constitute suitable alternative employment for Claimant in the interim period between September 27, 2001, and July 29, 2002. Thus, Claimant is entitled to temporary total disability compensation for the entire time period from September 27, 2001, through January 20, 2003.

Post-MMI Time Period

On February 10, 2003, Employer again offered Claimant the gatehouse clerk job. This sedentary duty job involves entering information into computers, receiving and dispatching containers, answering the phone and aiding the truck drivers as they arrive at the shipyard. The job can be performed while sitting or standing. Clerks sit at swivel chairs and work at adjustable computer monitors. They are able to take breaks as needed and also have a lunch break each day.

Because of her cervical fusion, Claimant has difficulty in sitting for long periods of time and frequently must stand up and walk around. Employer has agreed to accommodate Claimant's physical restrictions so that she will be able to return to work. For example, Employer has offered to obtain a raised desk for Claimant so that she will not have to bend down to use the computer. In addition, Dr. Steiner and Dr. Stokes felt that Claimant was able to do the gatehouse clerk job, and Dr. Pribil's restrictions were limited to activities which would not be required of Claimant in this sedentary job. Dr. Pribil also acknowledged that his belief that Claimant was unable to return to work was based upon her subjective complaints and that she would be capable of returning to work if she had no complaints.

Despite Employer's willingness to accommodate her restrictions, Claimant has never returned to work. In July 2003, Mr. Naquin found that Claimant did not exhibit maximum effort during her FCE and also showed signs of symptom magnification. Claimant, on the other hand, has testified that she exerted full effort on the FCE and that she is incapable of doing any work at this time. As previously noted, however, Claimant's subjective complaints of pain are of questionable validity when viewed in light of the objective medical evidence in this case, particularly when Claimant has never once even attempted to do the gatehouse clerk job since reaching MMI. I find that the gatehouse clerk job constitutes suitable alternative employment for Claimant. Thus, I find that Claimant has been able to return to work since the job was offered to her in February 2003. Claimant is therefore entitled to permanent total disability compensation only for the time period from January 21, 2003, through February 10, 2003.

Medical Expenses

Section 7 of the Act provides in pertinent part: "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order to assess medical expenses against an employer, the expenses must be reasonable and necessary. Pernell v. Capital Hill Masonry, 11 BRBS 582 (1979).

Claimant, who now complains of low back pain, seeks medical approval for a lumbar MRI recommended by Dr. Hamsa shortly before the hearing in this case. The record indicates that Claimant first complained of low back pain to Dr. Hamsa shortly after her initial workplace injury, although Dr. Hamsa's treatment of her focused mainly on the cervical spine. Similarly, although Dr. Pribil first documented Claimant's complaints of low back pain in May 2002, his treatment of Claimant focused on her cervical problems. Claimant never mentioned low back pain to Dr. Steiner, who examined her at various times in 2001 and 2003, and Dr. Steiner's lumbar MRIs only indicated degenerative changes normal for someone of Claimant's age.

When Dr. Hamsa recommended a lumbar MRI study in March 2004, however, he noted that Claimant had a bulge in the L4-5 disc and speculated that Claimant was suffering from an L-5 nerve root syndrome. Dr. Hamsa has been one of Claimant's treating physicians since her initial workplace injury, and given his findings and Claimant's own continued complaints of pain, I find his recommendation for a lumbar MRI to be a reasonable and necessary medical expense.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

1. Employer shall pay Claimant temporary total disability compensation for the time period from September 27, 2001, through January 20, 2003, based upon an average weekly wage of $988.06.

2. Employer shall pay Claimant permanent total disability compensation for the time period from January 21, 2003, through February 10, 2003, based upon an average weekly wage of $988.06.

3. Employer shall pay all reasonable and necessary medical expenses related to treatment of Claimant's work-related injury, including the lumbar MRI recommended by Dr. Hamsa.

4. Employer and Carrier shall receive a credit for benefits and wages paid.

5. Employer and Carrier shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

6. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to opposing counsel, who shall have twenty days to respond.

7. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

ORDERED this 8th day of June, 2004, at Metairie, Louisiana.

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LARRY W. PRICE
Administrative Law Judge

LWP:bbd